

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between


Grievant

And

Department of State

Record of Proceedings
FSGB Case No. 2011-054

November 6, 2013

DECISION

EXCISION

For the Foreign Service Grievance Board:

Presiding Member:

John M Vittone

Board Members:

William B. Nance
Jeanne L. Schulz

Senior Advisor

Joseph J. Pastic

Representative for the Grievant:

Pro se

Representative for the Department:

Melinda Chandler
Director
Grievance Staff

Employee Exclusive Representative:

Zlatana Badrich
American Foreign Service Association

CASE SUMMARY

HELD: The Department carried its burden to prove that grievant's off-color and offensive emails about women he dated, which were widely disseminated after his email account was hacked into, constituted "notoriously disgraceful conduct." The Board found that the penalty, a 30-day suspension, was unreasonable and mitigated the penalty to a five-day suspension.

OVERVIEW

Grievant, an untenured officer assigned to the [REDACTED] Section at the U.S. Embassy in [REDACTED] dated and had sexual relationships with three or four women within the diplomatic community, and one who was on the Foreign Service register. He sent offensive emails from his personal computer about these exploits to two friends in Asia, never expecting that they would be shared outside the three-person circle. While away from post, other friends advised him that his email account had been hacked. Upon returning to [REDACTED] at the first opportunity he reported the hacking to the Security Office, together with the name of the website that posted the emails titled "[REDACTED]" A few days later, at the department's request he voluntarily curtailed his assignment.

Grievant was charged with notoriously disgraceful conduct for having sent the offensive emails which were publicized. Two aggravating factors were cited: making degrading comments about women, race/ethnicity causing his curtailment; using poor judgment considering that grievant worked with two of the women; another woman was a potential colleague, and the other two were diplomats from [REDACTED] and [REDACTED]

The Deciding Official, who found no similar cases to serve as comparators, mitigated her proposal to separate grievant to a 30-day suspension, based on his excellent work record, his apologies to the women involved, his expressions of remorse, and the many letters of support submitted to her on his behalf. Grievant appealed to this Board, arguing that a 30-day suspension would have the same effect as a separation from the Service and was disproportionate to disciplinary action taken in other cases. After Consular and [REDACTED] language training, grievant was assigned to The U.S. Consulate in [REDACTED], where by all accounts he received stellar performance reports, just as he had in [REDACTED] prior to the email disclosures.

The Board found the Department's assertion that grievant's having had sex with 4-5 women constituted notoriously disgraceful conduct was inapt. The conduct charged was for having sent the emails, which later became public. It found in further mitigation the fact that grievant had a reasonable expectation of privacy, that he reported the hacking and website name at the first opportunity, and that the possibility of blackmail disappeared with his report. The Board cited several cases involving different facts as instructive in considering whether a 30-day suspension was justified. It determined that the cases highlighted involved far more serious behavior and greater potential for blackmail, including violations of law, regulation, and lack of candor unlike grievant's case.

The Board determined, with one panel member dissenting that a 30-day suspension was unreasonable under the circumstances, but that grievant should have known he would face

consequences if his emails ever became public, as officers overseas are by regulation considered to be on duty 24 hours a day. The Board found that given the circumstances of this case, a five-day suspension is the maximum reasonable penalty.

DECISION

I. THE GRIEVANCE

While posted to the U.S. Embassy in [REDACTED] grievant, an untenured Junior Officer, engaged in a chain of email exchanges with his two closest male friends over a period of several months which included off-color, offensive and degrading comments about women he dated. Grievant contends that the emails were written while off duty, on his personal computer, were meant to be tongue-in-cheek by all three friends and were not reflective of his true feelings. An unidentified person hacked into his personal account and forwarded a series of the exchanges to a blog called [REDACTED] (which describes itself as [REDACTED]).” The emails published on [REDACTED] had received over 163,000 hits as of September 10, 2012.¹ Grievant was identified by name and as an American Foreign Service officer (FSO) in [REDACTED]. At the behest of the Director General (DG), he voluntarily curtailed from post on [REDACTED]. [REDACTED], was charged by the Department with Notoriously Disgraceful Conduct and proposed for separation from the Service, which was later reduced to a 30-day suspension by the DG. Grievant appealed that suspension, requested continuing interim relief during the pendency of the appeal (which was granted), and that the suspension be rescinded or mitigated.

II. BACKGROUND

Grievant joined the Foreign Service in [REDACTED] [REDACTED] and after training was assigned to the [REDACTED] Section at the U.S. Embassy in [REDACTED] in [REDACTED] [REDACTED]. He was on annual leave with two friends in [REDACTED] in late December [REDACTED] when he learned from friends that his personal email account had been hacked. Back in [REDACTED] on [REDACTED] he learned that emails from his gmail.com account had been posted on [REDACTED]. On January 4, he reported this to the Assistant Regional Security Officer (ARSO). Later that day, the Regional Security

¹ The date of the Department’s Response to grievant’s Supplemental Submission.

Officer (RSO) received emails from [REDACTED] and [REDACTED] advising that a website [REDACTED] had posted a story [REDACTED]² The site reported that [REDACTED] assigned to Embassy [REDACTED] was involved in a contest with two of his friends to have sexual relations with as many women as possible, exploits of which were described in 26 email exchanges on the website³, [REDACTED] [REDACTED]. Pursuant to the Director General's urging, on [REDACTED] he requested voluntary curtailment of his assignment. Upon return to Washington, he was assigned to the Basic Consular Course and was interviewed by Diplomatic Security (DS) on January 19, with his AFSA representative present.

In response to DS questions, grievant stated that the information appearing on [REDACTED] "was not made up," but that the emails constituted the "exaggerated banter" between long-time friends who trust one another. Despite the first line of the email he authored on [REDACTED] "And so it begins. This is why I'm going to be out of the contest in a year's time," grievant denied that he and his friends were in a contest to have sex with as many women as possible. He characterized the exchanges as three friends in different parts of the world having a personal conversation. His friends, who had previously spent time with grievant in [REDACTED] and were acquainted with one or more of the women grievant mentioned in the emails, were communicating from a yacht in [REDACTED] about their own sexual exploits. Grievant explained that he had had conversations with these two friends by email for years, and that while not made up, the email exchanges at issue were "tongue in cheek." He acknowledged that his friends believe the emails attributed to them on the website are accurate, but none of them had believed

² Grievant and his two friends graduated from [REDACTED] in [REDACTED]

³ Names of the women were redacted by [REDACTED]

any of the emails would ever be shared outside their three-person circle. He had never expected to be “hacked” and had thought his gmail account with Google was secure and protected.

On March 10, [REDACTED] the DG proposed to separate him from the Service for Notoriously Disgraceful Conduct, along with consideration of several aggravating factors. With respect to notoriously disgraceful conduct, 3 FAM 4139.14 provides:

Notoriously disgraceful conduct is that conduct which, were it to become widely known, would embarrass, discredit, or subject to opprobrium the perpetrator, the Foreign Service, and the United States. Examples of such conduct include but are not limited to the frequenting of prostitutes, engaging in public or promiscuous sexual relations, spousal abuse, neglect or abuse of children, manufacturing or distributing pornography, entering into debts the employee could not pay, or making use of one’s position or immunity to profit or to provide favor to another . . . or to create the impression gaining or giving improper favor. Disqualification of a candidate or discipline of an employee, including separation for cause is warranted when the potential for opprobrium or contempt should the conduct become public knowledge could be reasonably expected to affect adversely the person’s ability to perform his or her own job or the agency’s ability to carry out its responsibilities. Evaluators must be careful to avoid letting personal disapproval of such conduct influence their decisions.

The charge against grievant, as set forth in the DG’s proposal to separate him, reads:

During the period [REDACTED], you engaged in a personal email correspondence with two friends in which you exchanged details about your sexual exploits in what you referred to as a “contest.” Among the demeaning and vulgar comments in your emails were the following:⁴

[REDACTED]

[REDACTED]

⁴ Throughout this decision, certain words and phrases have been masked for the sake of propriety.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The DG, who was also the Deciding Official, noted the fact that in his DS interview grievant denied having had sex with the [REDACTED] diplomat and that the emails were only intended for his target audience, two long-standing friends – who would interpret them as humorous. The DG observed that the Department’s definition of Notoriously Disgraceful Conduct does not exclude conduct that may become public by virtue of improper actions by others, that grievant’s emails remain publicly available and that “it can be expected that for years to come, individuals around the world may be able to find [his] personal email communications by using commonly available search engines.”

The DG also noted:

Department employees at posts to which you may be assigned in the future – as well as representatives of foreign governments with whom you may work – may, on the basis of your emails, question your attitude toward women. . . . As you noted . . . “there is nothing in the emails that would indicate they were not written

in earnest. . . people who do not know you will not have a frame of reference for your actions.” . . . This is a particularly difficult problem given the nature of the Foreign Service, where you will be working and communicating with individuals who not only will not know you apart from the emails, but will not be of the same culture. Accordingly, such individuals can be expected to find it difficult to get beyond the apparently earnest emails themselves. Such individuals will include women Foreign Service Nationals who will report to you, a situation which may make your supervision of them particularly difficult.

As you told DS agents . . . “Foreign Service Officers are supposed to espouse our values to foreign governments.” Your emails have brought discredit to you, the Foreign Service and the Department.

In consideration of the mitigating factors present in this case, especially grievant’s “remorse for women [you] cared about and for the government [you] vowed to serve” as well as grievant’s apologies to the women mentioned in the emails, and the many testimonials and letters of support received, including one from one of the women mentioned in the emails, who supported giving grievant a second chance, the DG mitigated the proposed separation penalty to a 30-day suspension. The Department’s decision on grievant’s appeal, fully endorsed the DG’s decision. Thereafter, in the Department’s Response to grievant’s Supplemental Submission, it charged, for the first time, that grievant’s relationships with the women constituted promiscuous conduct under the definition of “notoriously disgraceful conduct.”

After Discovery, the Department’s Motion to Compel and the Board’s Order on that motion, the Record of Proceedings was closed on October 11, 2012.

III. POSITIONS OF THE PARTIES

THE DEPARTMENT

Department regulations make clear that “maintenance of the highest standards of conduct by employees of the Foreign Service” is expected. The “representational nature of employment in the Service and the diplomatic privileges and immunities granted” those serving abroad, require “an especially high degree of integrity, reliability and prudence” during and after work

hours.⁵ Grievant knew or was responsible for knowing the applicable regulations but failed to conduct himself accordingly.

Nature and Seriousness of Offense

While grievant does not believe he engaged in promiscuous conduct, this case involves more than his admission of “approximately five intimate relationships over the course of six months” or “disciplinary action as a result of a failed relationship.” He wrote the admittedly offensive emails to his two closest friends and sent them via the Internet, despite the fact that “it is commonly recognized that the internet [sic] is not a secure channel for exchanging information.” Having chosen to write to his friends about his encounters in such a manner, grievant’s behavior was indiscrete and foolish. Arguments that he did not write the emails on a government computer, on official time, or with the intention they ever be made public do not excuse his actions. Though he argues that he violated no regulation and did nothing wrong, at the same time he acknowledges that in our “modern, electronic world, nothing is ever truly private,” and that writing “in the way he did was foolish.”

He was the one to use the word “contest,” reinforced by “I’m destined to drop into a distant third,” “need to do something to keep my numbers up,” and references to “lists,” which appear to be his and his friends’ way of tracking by number the women with whom they had had sex, e.g., [REDACTED] He and his friends now assert there was no contest. Before making her decision, the DG considered this assertion, and found that “his participation in the contest – whether real or figurative – made [him] vulnerable to blackmail.” As a [REDACTED] officer in [REDACTED] grievant was responsible for a range of issues, including [REDACTED] [REDACTED] which the Department sees as illustrative of the leverage that might have been used to coerce him.

⁵ 3 FAM 4111.1

The DG stated in the *Douglas* Factor checklist accompanying her Final Decision that while grievant “may have had an expectation of privacy” he “intentionally made degrading and insulting remarks” even though “He did not intend for the emails to become public.” The Department argues it is more reasonable to conclude there was a contest among the three friends because of grievant’s other choices of words: “I’m destined to drop into a distant third;” “I need to keep my numbers up;” “have to do something to keep my numbers up;” [REDACTED] [REDACTED]” Grievant’s sexual encounters involved Embassy [REDACTED] employees and other diplomats, contrary to values espoused by the Secretary of State in her preface to the 2011 Human Rights Reports: “The United States stands with all those who seek to advance human dignity, and we will continue to shine the light of international attention on their efforts.” Just as the U.S. seeks to hold other countries accountable in its reports, the Department must also hold its own employees accountable. Congress enacted the Foreign Service Act of 1980 finding that “a career foreign service, characterized by excellence and professionalism, is essential to the national interest to assist the President and the Secretary of State in conducting the foreign affairs of the United States.”

President Obama reiterated the importance of professionalism after reports of Secret Service agents involved with prostitutes in Colombia stating: “We’re representing the people of the United States and when we travel to another country, I expect us to observe the highest standards because we are not just representing ourselves.”

Neither grievant, nor those who wrote in his support, can dismiss the embarrassment suffered by the women referred to, the Department and U.S. Government. He admitted as much in his letter of apology to the Embassy’s Deputy Chief of Mission for the “negative effect this had.” His conduct was also notorious: by the time his discipline was proposed on March 10,

the site alone had over 148,000 hits. Grievant's emails remain publicly available and can easily be found on many websites and blogs other than by using commonly available search engines and grievant's name.

Nexus

There is a nexus between grievant's misconduct and the efficiency of the Service. The applicable regulations provide that discipline of the employee "is warranted when the potential for opprobrium or contempt should the conduct become public knowledge could be reasonably expected to affect adversely the person's ability to perform his or her own job or the agency's ability to carry out its responsibilities." (3 FAM 4139.14)

The Board has held that "The Department is not required to demonstrate a specific impact on an employee's job performance or a quantifiable effect on Service efficiency before it can impose discipline. Proof that an employee's off-duty misconduct conflicted with the agency's mission may be sufficient."⁶ In another case the Board held:

Grievant fails critically to recognize that Foreign Service officers are on duty 24 hours a day, seven days a week when serving overseas. It is not simply a matter of how well grievant performs in his job while in the workplace, but also how well grievant represents himself and the United States while living and serving as a diplomat overseas, that complete the true and total assessment of work performance, leadership, and judgment.⁷

Grievant himself recognized that his conduct conflicted with the Department's mission, admitting that publication of his emails "caused consternation around our organization at a time when my colleagues hardly needed additional headaches." The Deciding Official determined that employees at posts where grievant may be assigned and representatives of foreign governments with whom grievant may work may question his attitude toward women on the basis of the emails. As a political cone officer grievant will work with individuals from different

⁶ FSGB Case No. 2007-011 (November 5, 2007)

⁷ FSGB Case No. 2009-031 (July 8, 2010)

cultures who may not trust him because of the emails, including women who may report to him and render his supervisory role difficult. These considerations may well affect where grievant can be assigned.

Penalty

3 FAM 4377 specifies that the penalty for notoriously disgraceful conduct generally falls within the range of Letter of Reprimand to Removal from the Service. Grievant's 30-day suspension is well within range. Grievant's arguments on appeal are essentially the same made in his agency-level filings and his oral response to the Deciding Official, who took them into account, including the statements of support submitted on his behalf. She also considered the *Douglas* Factors,⁸ credited grievant's expressed remorse, that he did not intend for his emails "to receive widespread distribution," his apologies to the women identified in his emails, support statements made by one of the women for the record, lack of any prior discipline, and the fact that his only Employee Evaluation Report up to that time ([REDACTED]) was highly complimentary.

On the other hand were the aggravating factors of poor judgment the Deciding Official considered: the nature and seriousness of his conduct – degrading comments about the women, race in some instances, his failure to adhere to basic standards of conduct for an officer, and misconduct that resulted in curtailment from post, causing disruption and costing the government monetarily. She also considered the fact that sexual encounters about which grievant wrote involved two co-workers at our [REDACTED] Embassy, a potential colleague (Foreign Service applicant) and a [REDACTED] and a [REDACTED] diplomat. She credited the statement provided by the [REDACTED] woman over grievant's version in agency level filings. That employee stated

⁸ *Douglas v. Veterans Administration*, 5 MSPR 280 (1981); 12 factors are commonly used to determine an appropriate penalty for federal government employees.

that she met grievant on [REDACTED] and that they were in a relationship until [REDACTED] [REDACTED] when it ended on amicable terms. In hindsight, she believed he deceived her into believing he had a genuine interest in her. The Deciding Official found “grievant’s deceit and willingness to use a co-worker for his own purposes” as an indication of lack of integrity. His actions affected the employee personally, as she took leave from work and “sought the assistance of a psychiatrist.” Grievant knew or should have known the consequences of his actions given his email description of her as “conservative,” “[REDACTED]”

The Deciding Official also considered grievant’s January [REDACTED] DS interview in which he stated that he did not consider any of his email comments disrespectful of women. As noted by the Reporting Agent (RA), he stated:

He did not believe HE had done anything disgraceful as these were all normal relationships. RA asked subject if HE considered any of his comments in the emails to be disrespectful to women to which HE replied, “no.” RA asked SUBJECT if HE considered any of his comments in the emails to be racist to which HE replied that the emails were not meant to be taken as how HE viewed life, people, or women but were private conversations among friends.

The Department asserts that the emails were clearly disrespectful and that grievant’s later assertions that they were written “in jest” are not credible. It finds no fun or humor in any of the following:

[REDACTED]

Grievant’s claims that his comments were in jest reinforced the Deciding Official’s concern that he viewed and treated women about whom he wrote as a means to an end, his personal gratification and the amusement of his friends. Regardless, the emails contain demeaning language, and “arguably” express sexist and racist views, and reflect poorly on a Foreign Service Officer representing the United States. The Deciding Official correctly

determined that a significant penalty was warranted to maintain discipline, recognizing the pain and humiliation he brought to the women involved and the obstacles he created to effectively function as an FSO. There is no doubt that the notoriety of the emails brought discredit to him, the Foreign Service and the Department of State, and obviously conflicted with the Department's mission to represent the values and policies of the U.S.

The Deciding Official determined there were no previous cases sufficiently similar to serve as comparators in determining the appropriate penalty in this case. Grievant's contention that Case 2010-12683⁹, more egregious than his in which the employee received only a ten-day suspension, is inapt. That case involved two charges: poor judgment and notoriously disgraceful conduct. The first was for the married employee's actions overseas in drinking, driving, and picking up an unknown woman to give her a ride home at 1:30 a.m. The employee was found in his vehicle at 6:30 a.m. the next day by local police. It appeared that he had been drugged and robbed. The second charge involved the employee's admission that he had engaged in promiscuous sex with various women he picked up, and that he had provided money to assist them with tuition, books or rent. There was no finding of illegal activity or prostitution in that case and nothing remotely close to the notoriety in this case.

Though the employee was identified as a diplomat by the police and in an online news report, causing embarrassment to the Department, the notoriety was not widespread or lasting. The Department was unable to find the article currently online or to determine the number of hits it received. The article in the employee's file did not refer to any sexual liaisons, noting that he had been found in a "dream state" and was taken to a hospital. That employee did not publish his sexual exploits or use degrading language. In contrast, the notoriety in grievant's case was

⁹ That case was appealed, as FSGB Case No. 2012-019 (January 31, 2013). The Board found that the Department had over emphasized the aggravating factors and failed to properly consider mitigating factors. The penalty was reduced to a one-day suspension.

“viral,” involved the publication of lurid details on his relationship with multiple women, and the publication can still be easily found on the Internet simply by entering his first and last name. As noted by the Board in FSGB Case No. 2006-038 (December 21, 2007), citing *Douglas v.*

Veterans Administration:

Even where a grievant establishes that his penalty is dissimilar to that imposed in like cases, the Board must defer to the agency’s “primary discretion in exercising the managerial function of employee discipline and efficiency” without substituting its judgment, yet ensuring that the agency properly made its determination “within tolerable limits of reasonableness.”

The Board in that case further noted that in *Bryant v. National Science Foundation*, 105 F. 3d 1414 (Fed. Cir. 1997), the court held that the penalty chosen by an agency should not be disturbed unless it was so “outrageously disproportionate” to the offense, in view of all the relevant factors, as to constitute an agency’s abuse of discretion.

In this case, the Deciding Official was confronted with a “unique” misconduct situation. She considered each of the *Douglas* Factors to arrive at the penalty. She found grievant’s expressed remorse, and his apologies to the women mentioned in the emails mitigating. However, she also found that his off duty conduct far exceeded acceptable bounds of conduct expected of an officer. She mitigated the proposed separation to a 30-day suspension.

THE GRIEVANT

Grievant asserts there are significant facts not taken into account in the Department’s decision that weigh heavily on whether it has met its burden to prove a 30-day suspension is reasonable. He contends the penalty is disproportionate and not supported by fact or law. He is charged with non-criminal conduct for sending emails written in private, on his own computer, on his own time, to two long-time friends. He did not publish them on the Internet, though that is what the Department seeks to punish him for, something he did not do.

The Department's attempt to draw an analogy between his situation and that of U.S. Secret Service agents involved with prostitutes in Colombia is inapt. There is no similarity. In fact, solicitation of prostitutes by Foreign Service employees assigned abroad normally results in suspensions of less than five days. The employees in these cases normally are not charged with promiscuity or notoriously disgraceful conduct, though multiple sex partners are involved.

Contrary to Department assertions, his email exchanges were not part of a contest. Statements submitted into the record from his friends make clear there was no real contest, and that while not in good taste, the emails were the private, exaggerated banter between long-term close friends who trusted one another completely. One friend stated: ". . . these emails were tongue-in-cheek and do not describe a literal contest as asserted by [REDACTED] nor do they provide any useful information for divining our actions or statements towards others, or our true feelings about any of the events described." The other friend offered: "The content . . . while based on actual events, were largely fictionalization and a big inside joke. There was never a 'sex contest.' No one was ever actually changing their normal behavior in the interest of 'winning' some competition. Any language suggesting otherwise in these emails was a joke."

Grievant disagrees with the Department's belatedly charging in its response to his Supplemental Submission that he had promiscuous sexual relations¹⁰ with approximately five women¹¹, two of whom were U.S. Embassy employees, particularly one, who stated she felt deceived and sought time off and assistance from a psychiatrist as a result of the published emails. He is deeply sorry and has apologized to her, but in his own defense maintains he violated no rule or regulation upon entering a relationship with her: she was not in his chain of command; he is unmarried and not in a committed relationship. She stated their relationship was

¹⁰ See p. 20 for the Board's discussion on promiscuity.

¹¹ Grievant says there were four; he did not have sex with the [REDACTED] diplomat, though in one of his emails he claimed that he had.

proper and ended on a mutual basis; it was only after the emails were published that she viewed their past relationship negatively. Her understandable anger provides no justification for such a heavy penalty by the Department.

The other U.S. Embassy officer, a close friend whom grievant knew from their entry level training at the Foreign Service Institute in [REDACTED] began dating him in [REDACTED]. They lived near one another, frequently had dinner and watched movies together. She was the one who pointed out that that they would probably break up at some point and that it might be awkward as they both worked in the Embassy and had many mutual friends. It was that comment which prompted his reference to “our certain awkward parting” in one of the emails cited. They were still dating when the emails were published.

Grievant also strongly disagrees that his dating these women, the other two diplomats or the prospective FSO were a reflection of poor judgment, as he violated no policy or regulation. All relationships were consensual, normal adult relationships which came to amicable ends. His emails became public only after his account was illegally hacked and its private contents were sent to a gossip website. With his long working hours, the most logical place to meet a potential date was at the Embassy or a related diplomatic function.

The conduct charging him with “notoriously disgraceful conduct” is for his having authored and sent the emails; the actual relationships grievant had with the women were cited as aggravating factors in the agency’s final decision. His emails to his friends were private, not public in nature; and they discussed mutually consenting relationships, not “promiscuous” ones. The FAM does not include a definition of promiscuity. He should not be punished with a career ending 30-day suspension when he did not publish the private emails, or for having normal dating relationships with the women involved. He deeply regrets having participated with his

friends in exaggerating exploits and making degrading comments in their email exchanges, but emphasizes he violated no regulation in sending or receiving the emails on his private computer, and strongly denies they were engaged in a real contest. Yet, the penalty proposed here is far greater than that imposed on employees who have engaged in prostitution, been involved in spousal or child abuse, or have lied to federal investigators.

Similar Cases

Grievant argues that his conduct is far less severe than that of an employee who entered into extramarital affairs with critical threat nationals, without his wife's knowledge or contact reporting.¹² He faced Charge 1 - Improper Personal Conduct based on four specifications: admission he paid for sex 6-7 times with a critical threat (CT) massage tech; paid and had sex with a second CT massage tech; an extramarital affair with a married LES¹³ made him vulnerable to potential blackmail; and an extramarital affair with a local female made him vulnerable to potential blackmail. Charge 2 - Failure to Follow Regulations: failure to timely report relationships; dishonesty in annual leave destination - travel to former ordered departure post without a waiver or country clearance instead of the U.S. to visit family, as recorded on his travel itinerary. That employee held a sensitive, but not prominent position at the Embassy. While the Department found he had engaged in "notoriously disgraceful conduct" and affirmed the two charges and six specifications, it reduced his 20-day suspension to 10 days, which the FSGB affirmed.

IV. DISCUSSION AND FINDINGS

In all cases involving discipline, the Department has the burden to show by a preponderance of the evidence that the employee committed the acts charged, a nexus between

¹² FSGB Case No. 2011-051 (August 15, 2012)

¹³ Locally Employed Staff

the conduct and the efficiency of the Service, and that disciplinary action is warranted.¹⁴ It must also show that the penalty imposed is reasonable, proportionate to the offense charged, and commensurate with penalties imposed for similar offenses, if any.¹⁵

Before addressing details of the allegations of grievant's misconduct, we consider the question of whether there was a "contest" between grievant and his friends. While not determinative of the merits of this case, we believe that it is important to address this question in order to understand this case and our decision. Grievant and his friends deny that there was a "contest" and describe their emails as "exaggerated banter." Despite their protestations, the unambiguous language of the emails can lead to no other conclusion than that there was a contest. We agree with the Department that the emails were not humorous, display a poor attitude by grievant, and border on being racist. The problem that grievant created is what he wrote in the emails despite his assertions of the truth of the comments or his intentions. The fact that his emails are in the public domain, even without his permission, is the problem for which he must answer. His actions have caused embarrassment to himself, the Department, the Nation he represents, and the women discussed in his emails.

In Response to grievant's Supplemental Submission, the Department for the first time asserted that Grievant's having had sexual relations with the women was "promiscuous" under 3 FAM 4139.14, which addresses notoriously disgraceful conduct. It noted that the Board in FSGB Case No. 2011-051¹⁶ cited the Concise Oxford American Dictionary (2006 ed.) definition as "derogatory (of a person) having many sexual relationships, especially transient ones."

¹⁴ 22 C.F.R. 905.2

¹⁵ See FSGB Case No.2006-037 (September 28,2007); FSGB Case No. 2004-035 (January 28, 2005)

¹⁶ FSGB Case No. 2011-051 (August 15, 2012), the Board found grievant's extramarital sex with four women within a two-year period to fit the definition of promiscuity and that it constituted notoriously disgraceful conduct.

First, we agree with grievant that the charge of Notoriously Disgraceful Conduct is for his having sent the emails to his friends and it is clear that he was not charged with promiscuity in the proposal for discipline letter. The Department's attempt to do so in its Response to grievant's Supplemental Submission comes too late in the process and will not be considered by the Board.¹⁷ Promiscuity was not charged in the proposal to discipline, and is not an issue in this case. However, the fact that an unknown person or persons hacked into grievant's private email account does not exonerate his conduct. The Department's definition of Notoriously Disgraceful Conduct does not except conduct which may become public knowledge by virtue of improper actions by others. 3 FAM 4139.14.

Expectation of Privacy

Under the circumstances present here, we find that grievant did have a reasonable expectation of privacy in sending emails from his personal computer to his friends. The Department has cited no authority supporting its assertion "that it is commonly recognized that the Internet is not a secure channel for exchanging information." In Robert B. Yee v. Verna Lin, No. C 12-02474, September 20, 2012, the US District Court for the Northern District of California¹⁸ determined that Lin "intentionally accessed plaintiff's email without consent, resulting in damages." The court found that Yee's pleading "that his emails contained personal, confidential and private communications [was] sufficient for him to plead a reasonable expectation of privacy and an invasion of privacy argument." See also Aaron Mintz v. Mark Bartelstein and Associates Inc., et al.¹⁹ where the court found:

¹⁷ See *Douglas v. Veterans Administration*, 5 MSPB 313 (April 10, 1981), p. 20, which states: "Since 5 CFR 752.404 (f) forbids the agency from considering any reason not specified in the advance notice of proposed action, agencies must consider in preparing the advance notice . . . all of the factors on which they intend to rely in any consequent decision."

¹⁸ 2012 U.S. Dist. Lexis 134936

¹⁹ US District Court for the Central District of California, 2012 U.S. Dist. LEXIS 161600, November 1, 2012

Plaintiff has presented evidence that he had a reasonable expectation of privacy in his personal emails. It is undisputed that the hacked Gmail account was a web-based, personal email account Plaintiff attested in his declaration that he has been the sole account holder since he opened the account. . . .He further averred that he has “accessed the account through the website www.gmail.com and [has] used it for personal matters. He had a separate business email address which he used for business matters. . . . [His] Gmail account was pass protected at all times, and he has never authorized any (of respondent’s) employees to access it. . . . Based on the foregoing, a reasonable jury could only find that Plaintiff had an expectation of privacy in his personal email account.

While based on different sets of facts, these recent cases support the proposition that grievant had a reasonable expectation of privacy in his email messages sent from and received in his personal gmail account. His comments became known on the [REDACTED] website after his account was hacked without his permission. This conclusion does not diminish his responsibility for the effects of their publication even though his account was hacked into by a third party, but it is mitigating. As noted in many cases by the Board, Foreign Service Officers overseas are on duty at all times and must conduct themselves in a manner that does not reflect negatively on the Department. Grievant’s emails clearly fail that test.

Aggravating Factors

In the following paragraphs we address the aggravating factors cited by the Department, which are in bullet form and bold font.

- **Your misconduct resulted in your voluntary curtailment, resulting in a monetary cost and disruption to post.**

We find that the Embassy was disrupted by grievant’s early departure. Either another officer was brought in to cover his position and go through a learning curve, or others in the [REDACTED] section had to take on grievant’s duties. However, we also find that the monetary cost of his curtailment would have been incurred when he was scheduled to depart post for onward

assignment. The Department has provided no evidence to indicate that the curtailment cost was more than had grievant departed as scheduled.

- **“You showed particularly poor judgment in having sexual relationships with . . .(two names deleted)You stated that another woman, (name deleted), is on the Foreign Service Register . . . You showed extremely poor judgment in having a series of short-term sexual relationships with [these women].”**
- **Ms. (name deleted) informed . . . that you deceived her into believing that you sought a serious relationship, when in fact you were not Your deceit and willingness to use a co-worker for your own purposes indicate a lack of integrity. Your actions had a direct impact on the work of the Embassy, as well as (her) personally. She stated your actions affected her at home and work . . . that she had to take leave from work and sought the assistance of a psychiatrist. You knew or should have known of the consequences of your actions on [her], given your description of her in an email as “conservative” and [REDACTED],”**

The evidence of record demonstrates that the women were consenting adults and chose to have sexual relations with grievant. The Department has presented no evidence to justify or explain how grievant’s sexual relations with them is aggravating. There is no evidence they were forced or pressured into a relationship with him. None were supervised by the grievant. In fact, 3 FAM 1527, Policy on Consensual Relationships between Supervisors and Subordinates, at paragraph b provides: “Consensual relationships are dating or sexual relationships willingly undertaken by the parties.” Paragraph i. states: “This policy does not apply to employees who are in different supervisory chains or who are peers in the same chain.” Grievant’s relationships were open and consensual, and Department policy does not forbid such relationships.

With regard to the second paragraph above, we cannot place substantial weight on the first two sentences as they represent the woman’s beliefs, formed after the emails were published, and are not supported by any other evidence. Grievant and she dated from [REDACTED] [REDACTED] when their relationship came to an amicable end by mutual agreement.

After the emails were published, she wrote an anonymous letter [later admitted to] to the Deciding Official, castigating grievant for “breach of privacy and harm sustained at post.” She stated that “no reasonable person would want the intimate details of his or her sexual life and romantic relationships exposed against his or her will on the internet” “[His] actions caused me public embarrassment and created a hostile environment in the embassy.”

With respect, the Board is not engaging in “blaming the victim” nor do we doubt her feelings of embarrassment. However, the evidence on this factor is limited to her statement. We do not know if she saw the doctor once or continues to receive treatment. The allegation of a “hostile work environment” is not supported except by her statement.

The references we are able to identify concerning her on the website are emails dated [REDACTED]. The subject of these emails is neither identified on the [REDACTED] site by name nor as working at the American Embassy. We credit her anguish, anger and embarrassment. However, we find that the limited evidence in the record does not provide a sufficient basis to place any significant weight on this factor as found by the Department.

- **Although you denied to DS investigators that you had sex with the [REDACTED] diplomat, whom you described as a “friend,” you stated in an email that you had done so for purposes of the contest, which had the potential to embarrass her personally and professionally. Moreover, you admitted to having sex with (name deleted), a diplomat for [REDACTED]. Your action toward women associated with the diplomatic community (both American and international), and the way you described them, combined with the publicity that your actions received, have severely damaged your ability to act as a Foreign Service Officer, particularly overseas.**

The finding that grievant’s email boast regarding the [REDACTED] diplomat “had the potential to embarrass her personally and professionally” is without any support in the record. Neither her name nor her post of assignment appear in the [REDACTED] postings. By the same token,

the Department has submitted no evidence to support the conclusion that grievant's admission to having had a relationship with a [REDACTED] diplomat and a prospective FSO in any way affected his ability to act as a Foreign Service Officer either domestically or overseas. There is no mention of either person in the emails published on [REDACTED]. The [REDACTED] diplomat wrote a letter in grievant's support, stating she knew he wasn't the person he portrayed himself as in the emails.

Grievant was traveling in [REDACTED] with two friends when he learned on [REDACTED] [REDACTED] that his email account had been hacked, after other friends pointed out to him that they had received copies of his emails. Upon return to [REDACTED] on January 3, [REDACTED] he learned of the [REDACTED] postings and reported the hacking to the Embassy's RSO the following morning, before our embassies in [REDACTED] and [REDACTED] reported them to [REDACTED]. Had the hacker approached grievant before publishing his emails, the possibility for attempted blackmail existed, but the Board finds that possibility ended upon their publication.

The Department has not proven that grievant was or is unable to perform his job. After his curtailment from [REDACTED] he was assigned to Consular Course and [REDACTED] language training. According to grievant and AFSA, he received stellar marks in both and successfully served as a Consular officer in [REDACTED]. His EER there lauded his performance. He was put in charge of the [REDACTED] visa program and chosen from all JOs at this large post to be in charge of the Consul General's farewell party. This demonstrates that grievant can function as a Consular officer in some countries. He will carry the onus of having participated in the ill-advised, distasteful emails into the future and will obviously beware of bidding on certain posts. However, the Department is correct that his past conduct will create significant obstacles to assigning him to some countries.

- **You identified two of the women with whom you had sexual relationships, Ms. (name deleted) and Ms. (name deleted), as knowing the "implications" of**

forwarding your emails to [REDACTED] Such knowledge was not necessarily limited to these individuals. By participating in the contest, you made yourself vulnerable to blackmail. Further, your misconduct could make you a target during any future overseas assignment.

The Board finds grievant's explanation of "knowing the implications of forwarding [the emails to [REDACTED] to be more plausible. He claims his statement to DS was misinterpreted:

RA asked SUBJECT if he had any ideas or suspicions about who may have hackedSUBJECT indicated that the persons who would have known about the implications of forwarding HIS personal emails to such a website would have been . . . (name deleted) . . . and . . . (name deleted) SUBJECT stated that HE only mentioned these two women, because HE could not rule them out. SUBJECT stated that HE had no reason to think that either one of these women would want to harm HIM.

Grievant asserts the above suggests the possibility of blackmail, but he meant that he doubted either of them was involved in hacking his account because both would have known it was illegal. As to the second sentence, the Department has provided no evidence or possible scenario to support its speculation that the charged conduct could make him a target in any future overseas assignment. The emails are already in the public domain, and are not likely to be used to coerce him. The Department has not substantiated any part of this as an aggravating factor.

Douglas Factors

The Board now reviews the Department's application of the *Douglas* factors²⁰, and the Board's conclusion on whether the factors were properly considered and reasonably applied:

1) Nature and seriousness of the offense and its relation to the employee's duties and responsibilities²¹

We agree with the Department regarding the seriousness of the offense. It led to his curtailment. Even grievant has come to accept that conclusion. On this point however, the Department relies a great deal on the effect of publication on the women discussed in the emails.

²⁰ 3 FAM 4137

²¹ Under *Douglas v. Veterans Administration*, MSPR 280, April 10, 1981, this is considered the most important factor

The only person the Department has identified as distressed and embarrassed is the [REDACTED] employee, who stated that she was subjected to a “hostile environment” and took leave from work to talk to a psychiatrist. There is no evidence in the record as to any hostility she may have suffered, nor the length of time she was absent from work. The Department has the burden of proof in disciplinary cases and it has failed to put this factor into perspective.

There is nothing in the emails to indicate the identity of any of the other women grievant dated and the Department, beyond its bald assertions of distress and embarrassment, offers no analysis as to how these unidentified women suffered. It also does not discuss with any specificity the many letters written in support of grievant’s continued employment in the Foreign Service.

The [REDACTED] diplomat, who to all appearances is not mentioned in the [REDACTED] publications, submitted a letter in grievant’s support, recognizing that the sentiments he expressed were braggadocio for his friends’ benefit and not a true reflection of who he is. She stated that they had dated over the summer of [REDACTED] and after having read the emails, sent him an email expressing her lack of sympathy, but soon changed her mind. As one of the few who saw him during the worst few days before his curtailment, she found that any suggestion he felt no remorse was untrue; he “was extremely ashamed, deeply mortified and profoundly sorry.” Even as a “self-described profound cynic,” she was concerned that he might do something drastic in the face of his “pain and distress.”

Grievant apologized in person to the American diplomat/friend he was dating when the emails emerged. They had known one another since the orientation class after entry into the Foreign Service. He explained the context of his reference to her in the email exchange and she forgave him, saying that she understood that he was not the person portrayed in the emails.

Without support from more than one source, we conclude that the Department has accorded too much weight to its conclusion that all of the women grievant dated were embarrassed and distressed by publication of the emails. There is no evidence that any of the other women to whom grievant apologized were ever interviewed by DS.

2) Whether the offense was intentional, technical or inadvertent.²²

With regard to this *Douglas* factor, the DG concluded that:

Although [grievant] may have had an expectation of privacy in his personal email correspondence with close friends, the employee intentionally made degrading and insulting remarks about women in his email correspondence. He did not intend for the emails to become public.²³

The Department maintains that he had no reasonable expectation of privacy. Grievant's participation in the email correspondence was intentional and not inadvertent. Even though the Board finds that he did have a reasonable expectation of privacy as discussed above, he is responsible for the effects of his conduct

4. Contacts with the public and prominence of position.

The Board agrees with the Department that "He [had] substantial contact with the public and members of the international community."

5. Past disciplinary and work record.

The Board agrees with the Department that at the time of the offense, grievant had had two years of federal service and no previous discipline actions. His [REDACTED] EER was "highly complimentary."

²² 3 FAM 4375; *Douglas* at 21(9)

²³ Department's *Douglas* factor no. 2

6. Consistency of the penalty with those imposed upon other employees for similar offenses and with the table of penalties.

The Board agrees with the Department that there are no cases cited with similar conduct, but notes that in other cases of notoriously disgraceful conduct in which married employees engaged e.g., criminal misconduct involving prostitutes, etc., penalties ranged from one to five day suspensions.

7. The notoriety of the offense or its impact upon the reputation of the Department of State.

The Board agrees that publication of grievant's nine emails made his conduct public, notorious, and available to those who might search his name on the internet. He was identified as a "State Dept. Staffer" and as a "Foreign Service Officer." There are posts around the world that grievant will not bid on, but there are others that will not object to his private conversations if they become known. His recent tour in [REDACTED] as a consular officer demonstrates that there are posts and positions where he can serve successfully. We have no doubt that grievant will tailor his bid lists for onward assignment avoiding certain posts, and do not believe that the Department would impose a directed assignment to countries where he would not be accepted.

9. Clarity with which grievant was on notice of violation of any rules that were violated in committing the offense.

Grievant states that he never expected his email account to be hacked and on the fact that his off-duty emails conflicted with Department regulations requiring the maintenance of the highest standards of conduct both on and off duty. Regardless of his belief before publication, grievant had a clear duty to know the rules and failed to abide by them when he sent the emails to his friends.

10. Potential for employee's rehabilitation.

Grievant has accepted responsibility for his actions, apologized to the women referred to in the emails and is trying to rehabilitate himself. He has learned a costly lesson, that written words can destroy one's privacy and career, regardless of his beliefs about their private nature, and have a negative effect on his colleagues and the Department. The Department relies on the fact that grievant was initially reluctant to discuss the content of the emails. However, he brought the hacking to the attention of the RSO on the morning after learning of the [REDACTED] posting with full knowledge DS would view what he had written. It is understandable that he needed a few hours to process what had happened and to contact AFSA.

Grievant served roughly one year in [REDACTED] prior to the Department's submission in Response to his Supplemental Submission. There is no evidence he or his new post suffered any negative fallout from the [REDACTED] postings. There were no press questions or press releases, and no mention of the emails in newspapers, radio or television reporting. His EER on his performance in [REDACTED] was by all accounts laudatory, and his service there was not affected by the notoriety of the [REDACTED] publication. However, as noted above, we recognize that there are some posts that the Department will not be able to assign him.

Penalty

By any standard grievant's conduct was notorious and disgraceful within a segment of the world's population in that it became publicly known and adversely affected his ability to continue in his position at the Embassy in [REDACTED]. However, the question is whether his conduct warrants the severe punishment proposed by the Department. There was no press questions or press releases, and no mention of the emails in newspapers, radio or television. The rate of hits on [REDACTED] was high at first but appears to have declined over time, and may continue

to decline in the future. However, the emails and comments about them will be available on the world-wide-web into the foreseeable future.

Grievant held and still has a top-secret clearance; there is no evidence in the ROP that his security clearance has been brought into question. In a sense, his offense was inadvertent as he did not imagine that anyone would want or have reason to hack his email account. His conduct was voluntary, but predicated on the trust that his offensive email messages were part of private communications between friends who would never divulge their content to others. There was no “offense” until grievant’s emails were hacked and published. He violated no law in authoring and sending them to his friends. He has apologized to all of the women referred to and regrets that he wrote the tasteless and crude emails to his friends. He is distressed that the emails became public.

The former DCM in [REDACTED] (now an Ambassador), grievant’s rating officer and many other colleagues and friends sent letters to the Director General expressing their beliefs that the emails were written “tongue in cheek” and of grievant’s true remorse that they were published. Among the many letters of support submitted, grievant’s rating officer in [REDACTED] wrote to the Director General:

It would be a great loss to the State Department if [REDACTED] were to leave the Foreign Service. Frankly, I’ve never worked with a first tour officer as thoroughly impressive as [REDACTED]. When [we] worked together, I recollect telling him on several occasions that I was sure he would rise to the top ranks of the Foreign Service. These were sincere words, not flattery. [REDACTED] deftly handled an extremely complex [REDACTED] portfolio that had previously been handled by mid-level officers. His stellar work was repeatedly praised by top U.S. officials. . .

A colleague who served with grievant in [REDACTED] wrote:

He is a fundamentally descent [sic] person of strong moral character... Though his language was crude and inappropriate, I saw during his relationships that [REDACTED] behavior towards his partners was always well intentioned and

discrete, despite what a very few others with an axe to grind, or a casual blog reader who does not know him might suggest.

Grievant's reviewing officer (the DCM) for his [REDACTED] EER perhaps said it best:

[Grievant] is an extraordinary officer. He is performing now at a level well above his grade, and his potential is exceptional.

[REDACTED] is smart in a range of ways. In an organization full of brainiacs, [REDACTED] stands out. First he's smart on substance. We gave [REDACTED] the challenging [REDACTED] [REDACTED] In record time he mastered a world of complex negotiating history and acronyms, coordinating effectively with his [REDACTED] counterparts on issues of high interest in Washington. So it was no surprise when – with a difficult Washington message to deliver – colleagues in [REDACTED] reached out to [REDACTED] directly to coordinate. [REDACTED] knows his wonky subject through and through, reporting quickly and clearly.

Second, [REDACTED] is a smart manager, handling complex multi-agency visits at the Undersecretary level. In his boss's absence, [REDACTED] managed the June visit by [REDACTED] He led his embassy-wide team with professional calm...

We find grievant's record of performance and contributions to be mitigating. Among the letters of support are those from persons who have worked closely with grievant, who were aware of the [REDACTED] publication, and still speak to the high quality of grievant's work product and his ability to be a representative of the Department. The penalty for notoriously disgraceful conduct according to the Table of Penalties ranges from a Letter of Reprimand to Removal. On the facts presented here there are no similar cases. However, on the matter of penalty, the Board finds there are cases involving different facts that are instructive in considering whether grievant's penalty in this case falls within the realm of reasonableness and has been justified by the Department.

In FSGB Case No. 2011-051 (August 15, 2012), the grievant was proposed for a 20 day suspension, later reduced by the Department to 10 days, for four specifications of improper personal conduct and two specifications of failure to follow regulations while assigned to two

different posts, the second a critical threat (counterintelligence) country. His wife and children did not accompany him to either post. In the first country, he had an extramarital relationship with a local national female. In the critical threat posting, he admitted to paying for multiple sexual relations with two “massage techs,” and had a sexual relationship with a married locally employed staff female. He did not inform his wife of any of the encounters or file contact reports. When interviewed by the Regional Security Officer (RSO) he then admitted to the above and “other social relationships” with other local nationals in the critical threat country. He was required to file late contact reports, his access to the Embassy was revoked and he was curtailed. After filing another late contact report the following month, his security clearance was suspended and he was charged with improper personal conduct with four specifications; these included notoriously disgraceful conduct, vulnerability to potential blackmail, dishonesty with his supervisor when he requested leave to travel in 2008 to visit his family in the U.S. and instead returned to his previous post (on ordered departure status without authorization or country clearance). He initially lied about having met with his former lover there, but later admitted it, but denied having sex with her. The Board sustained the 10-day suspension.

In FSGB Case No. 2007-011 (November 5, 2007), during a security clearance update interview grievant, who was married, volunteered that he had engaged prostitutes 30-40 times in [REDACTED] (where it is a criminal offense to purchase sex) over a three-year period, and in [REDACTED] had 10-20 relations over a three-year period. He was charged with improper personal conduct. Aggravating factors were the potential for embarrassment to the U.S. Government (in [REDACTED] damaged relations if he had been arrested in [REDACTED] conduct unbefitting a Foreign Service Officer and the potential for blackmail, because he did not inform his wife. For all of these actions, a three-day suspension was proposed by the Department and sustained by this Board.

In a very recent case, FSGB Case No. 2012-045 (May 15, 2013), the grievant, a DS officer, was charged with Notoriously Disgraceful Conduct as a result of his arrest in [REDACTED] on a fourth degree felony charge following an argument with his wife about a message on his cell phone that led her to believe he was having an affair. They became involved in a physical altercation.

In her sworn statement seeking a protective order against grievant she stated:

He immediately grabbed me by the neck, threw me (like a body slam) on the ground, straddled my body and put his hands on either side of my head and began to smash it into the floor about 4 or 5 times. I did not black out but saw stars and knew he was going to kill me if he continued . . . I was totally incapacitated by his abuse and I think I was screaming because my children came into the room and screamed, "Daddy stop!" It was their screams that made him stop.

The incident was reported on television, a newspaper website, and web blogs with headlines: [REDACTED]

[REDACTED] All articles identified the wife's injuries and grievant as an employee of the U.S. Department of State. In December 2011, that grievant was charged with notoriously disgraceful conduct and proposed for a five-day suspension, which he appealed. The Department upheld the charge, but reduced his suspension to three days, which this Board sustained on appeal.

These cases involve far more serious behavior, with violations of regulations and criminal laws, and arguably held greater potential for blackmail than grievant's. He reported the hacking and website name at the earliest opportunity. The content was already public knowledge and grievant reported it and the website to the ARSO before our embassies in [REDACTED] or [REDACTED] did. He had nothing to hide since the RSO had access to the website and could read for himself what it said. Two of the above cases base the potential for blackmail on the fact that wives were not informed. In addition, unlike the cases cited above, while grievant admitted authorship of the

emails and attempted to portray his noxious conduct in the best possible light, he did not misrepresent what occurred to his supervisors.

Mitigation

We find grievant's exceptional accomplishments as a first tour officer, his remorse for having written the emails, his successful performance in [REDACTED] and the strong letters of support submitted on his behalf merit further mitigation in this case.

We do not find that the record supports a thirty-day suspension. Grievant is unmarried and had consensual sex with the women involved. Unlike the cases discussed above which involved prostitution, extra marital sex, and physical violence, he violated no law or regulation in his sexual affairs or in his private emails. Grievant has acknowledged that his emails were inappropriate, susceptible to hacking and that he should not have written and sent them to his friends.

V. DECISION

We find that a 30-day penalty is unreasonable under the circumstances present here. We uphold the charge of notoriously disgraceful conduct. We find that a five-day suspension without pay is the maximum reasonable penalty under the facts of this case, and is greater than two of the cases discussed above that involved deception, misrepresentation, and physical violence.

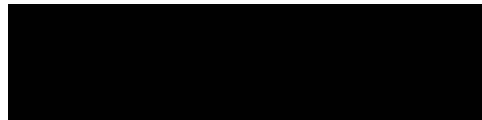
The grievant's appeal is denied in part and granted in part. The Department is directed to reduce the penalty to a five-day suspension, and is further directed to submit to the Board a revised suspension letter within 30 days of receipt of this decision. The Department should ensure that the names of the women involved herein be deleted from any document placed into grievant's OPF or public document as a result of this decision.

The grievance is affirmed in part and denied in part.

For the Foreign Service Grievance Board:



John M. Vittone
Presiding Member



Jeanne L. Schulz
Member

DISSENTING OPINION

I respectfully dissent from the majority opinion that the Department has failed to justify the 30-day suspension proposed in this case. In my opinion, the Department has shown that the proposed discipline is warranted and proportionate to the offense. While no true comparator cases with similar offenses were found, there are several that provide guidance on the reasonableness of the penalty – although the majority views these same cases in a different light.

Grievant argues in his Final Rebuttal that several cases cite incidents of more severity or notoriety and yet resulted in far less of a penalty than that proposed in this case. However, all of these cases limit discussion to the actual charge, i.e. the action(s) that led to the penalty with very little discussion of the “impact” or the “effects” of the action(s). Moreover, the charges – in number, circumstances, and potential effect on the Foreign Service – are dissimilar in several important ways. We identified three additional cases, and while instructive, I do not agree with the majority that they suggest the Department has applied an unreasonable standard in proposing a penalty for grievant.

Let’s look at the three cases on which the majority based its decision with respect to the proposed penalty:

FSGB Case No. 2007-011 (November 5, 2007) – documents a level of promiscuity that likely exceeds any previously brought before this Board, where an employee admits to 40-60 incidents in which he engaged the services of a prostitute – most of these in a country in which prostitution was illegal. A three-day suspension was proposed for his conduct, a penalty that was upheld by this Board. Even though the actions took place in two countries where the Officer was assigned, the distinguishing difference is that the Deciding Officer found there was no notoriety, although the officer found the potential for embarrassment to be an aggravating factor. In this

respect this case is fundamentally dissimilar from the instant case. In the instant case, not only is there potential for embarrassment to grievant, the agency, and the U.S. Foreign Service, the emails at the heart of the case have already been viewed by more than 160,000 people. Dissemination of information by electronic means of emails authored by grievant, and the ability instantaneously to reach large numbers of people – in addition to the continuing accessibility of these postings – give this case an immeasurable and arguably unlimited impact on the Department that may affect current and future Officers. While we may never know the full impact of grievant’s conduct – notwithstanding the experience of his recent posting to [REDACTED] – electronic dissemination of his email messages raises notoriety to an unprecedented level. Whether or not grievant is responsible for posting the information on the Internet, he is ultimately responsible for it since he drafted many of the messages and participated in the circulation of his and of other similar messages. While grievant may have expected his email messages to remain private, he knew or should have known that privacy was not guaranteed.

In FSGB Case No. 2011-051, the employee was proposed for a 20-day suspension, subsequently reduced to 10-days and sustained by this Board, for four specifications of improper personal conduct and two specifications of failure to follow regulations in two countries, one of them a critical threat country. The employee was found to have engaged in promiscuous behavior, “which is included in the definition of ‘notoriously disgraceful conduct,’ for having sexual relationships with several local women. He admitted speaking openly to fellow employees about his extramarital sexual activities (but not to his wife), which the Deciding Official deemed “open and notorious.” Also, he failed to make timely contact reports in a critical threat country, and his security clearance was suspended. Nonetheless, the Deciding Official found mitigating the fact that public notoriety did not extend outside the Embassy, thus,

the notoriety of the employee's conduct does not rise to the level of that in the instant case which has received worldwide dissemination.

The third case on which the majority relies as guidance in reviewing the Department's proposed penalty is FSGB Case No. 2012-045. The case involves physical abuse in a marital dispute, wherein a DS Officer struck and injured his wife severely enough that she was taken to hospital where she was diagnosed with internal cerebral bleeding and kept overnight. The employee was arrested on a fourth degree felony charge. The Department charged him with Notoriously Disgraceful Conduct, and his security clearance was suspended for a year and a half. The story of the abuse – with the employee identified as a State Department Officer – was picked up by news media and later posted to various Internet web sites. The Department proposed a five-day suspension, which was reduced to three days and sustained by this Board. As unfortunate as this case was, it involved a dispute between a man and his wife, who eventually reconciled. It was a violent act that left the wife with injuries, so in that sense it demonstrated more serious conduct than the instant case, but the impact of the conduct on the Department was limited. Media coverage gave notoriety to the case, but coverage was short-lived, and the story never got traction. While tragic for the couple and family, the incident took place in the U.S., not overseas, and while the exposure was broad domestically, it had no lasting effect on the Department's primary foreign relations mission or on the Foreign Service.

The case under review, however, involves conduct that appears to be far more deceitful and potentially harmful than that in the three cases cited, in that grievant's attitudes expressed in the email messages he wrote seem to espouse a more generalized attitude toward women that is hard to dismiss when viewed (as many of grievant's supporters admit) without the context of knowing anything more about him. The messages appear to project a pattern of behavior toward

women, which, in the opinion of the Deciding Official portray him as someone whose willingness to use a co-worker for his own purposes indicates a lack of integrity. The email messages that circulated and remain accessible worldwide, suggest that grievant is willing to describe his intimate relationships in a most crude and vulgar manner, betraying the trust and confidentiality of the individuals involved. It suggests further a Foreign Service Officer – and by inference a Foreign Service – callous in relationships with others, prone to revealing “true” feelings in “private” conversations once the spotlight is directed elsewhere.

3 FAM 4111.1 provides:

The attainment of U.S. foreign policy objectives depends substantially on the confidence of both the American and foreign public in the individuals selected to serve in the Foreign Service. The agencies, therefore, require the maintenance of the highest standards of conduct by employees of the Foreign Service, including an especially high degree of integrity, reliability, and prudence. Given the representational nature of employment in the Service and the diplomatic privileges and immunities granted employees of the Service abroad, it is necessary that employees observe such standards during and after working hours or when the employee is on leave or in travel status.

Grievant’s conduct undermines the very confidence on which the Foreign Service depends for the successful achievement of U.S. policy objectives.

The majority opinion establishes the legal underpinning to show that grievant had an expectation of privacy when he drafted messages on his personal gmail account. Even so, it is of little consequence that he, and his friends, may have had such an expectation, and may have intended that the email messages remain private; the fact is that they did not, and the Department and its Officers (past, present and future) bear the brunt of grievant’s poor judgment. It is the circulation, and potential for continued circulation of the email chain that displays the “notoriously disgraceful conduct” in which grievant engaged. The email descriptions of grievant’s conduct is damaging to the Department because readers may infer that such activities,

and in this case such attitudes, are not isolated to a single Department employee, particularly if there are limited or minor repercussions as a consequence of his actions. While grievant now contends that these alleged exploits are exaggerated, and that he and his colleagues did not engage in a “contest,” the evidence – in fact, the text of the email messages – show otherwise. Although the names of individual women he described are not found in the email chain published on the Internet, the descriptions are real, and sufficiently detailed and unique that individuals are identifiable – certainly by the women who are described, by their friends, and possibly more widely. Both the grievant and the women involved confirm the relationships. Despite their protestations to the contrary, the context of the email exchange leaves little doubt in the minds of readers – or to this Board – that grievant and his friends were competing to seduce women and that they felt it was important to report the number of women with whom they had sexual relationships. The descriptions of the women made by grievant are specific, demeaning and degrading, sexist, and even racist in character, and while grievant claims hyperbole, individuals are clearly identifiable from his comments.

Grievant argues that he did not “publish” the email chain, and that they became public only after some unknown person hacked his personal email account. He is not charged with “publishing” the emails or causing them to be distributed on the Internet. The “conduct” in question is his authorship of crude, degrading descriptions of individuals whose trust and confidence he gained and then violated in the most personal and demeaning manner imaginable. That grievant had sex with the women or whether he was promiscuous in doing so, misses the point of the tragedy his conduct has caused. He alone is responsible for the breach of trust and confidence now memorialized not only on [REDACTED] but on other blogs across the Internet. If grievant’s email account had not been hacked – and if, *arguendo*, the same messages had been

released to the Internet as a result of a computer glitch or some untraceable data dump for which no individual was directly responsible – the impact of the email messages that grievant drafted, and the email chain in which he actively participated, would be the same. 3 FAM 4139.4 does not include in its definition of “Notoriously Disgraceful Conduct” any mention of how said conduct becomes “widely known”, only that if the conduct is such that it “would embarrass, discredit, or subject to opprobrium the perpetrator, the Foreign Service, and the United States” does it qualify. The conduct described in grievant’s email messages, and which he attributes to himself, clearly falls within this definition. His repeated contention that he did not publish or cause the email messages he authored to be published is misplaced, whether or not he had an expectation his email messages would remain private. The fact that he admits writing them, that he does not deny the actions described in the emails, that they have been viewed by an increasingly large number of people, and that they remain accessible on the worldwide web, fit exactly the type of behavior to which 3 FAM 4139.4 was intended to apply.

I find no basis on which to argue that the Department’s proposed 30-day suspension is unreasonable or disproportionate to the conduct grievant admits to having committed. Accordingly, I would deny the grievance in its entirety.

DISSENTING



William B. Nance
Member